In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 113

UNITED STATES SHIPPING BOARD EMERGENCY FLEET Corporation, petitioner

v.

WESTERN UNION TELEGRAPH CO.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE PETITIONER

Upon the oral argument of this case on December 5, 1927, one of the members of the Court suggested that counsel for the petitioner file a supplemental memorandum setting forth certain portions of the record referred to on the argument. This memorandum is filed in accordance with that suggestion.

I. On page 14 of the record, in the agreed statement of facts which was adopted by the trial court as its findings (R. 56), it appears that (italics ours)—

> *During the period when the messages involved in this suit were sent and at all times subsequent thereto the Fleet Corporation*

operations have been exclusively the following: The management, operation, maintenance, repair and reconditioning of vessels; the establishment and operation of lines and routes of vessels; the completion or conclusion of construction work upon vessels; the sale of vessels; the operation and sale of housing projects, real estate, railroad and other similar property; the operation and sale of dry docks; the custody and sale of other property and materials; matters of accounting; insurance and matters pertaining to the same; the operation of pier and pier facilities; the disbursement and expenditure of all moneys arising out of operations, and of funds allotted to it from appropriations by Congress; the leasing and rental of offices, warehouses, docks and storage facilities deemed essential by it for its business and for its terminal facilities; matters incidental to the foregoing, including the employment, compensation and removal of officers and employees, *and in doing the foregoing the Fleet Corporation has at all times since September 30, 1921, and until January 10, 1924, conformed to the directions with regard thereto contained in the resolution of the United States Shipping Board adopted September 30, 1921,* and since January 10, 1924, to those contained in the resolutions adopted that day by the said Board, copies of which resolutions are hereto attached marked Exhibits "E–1" and "E–2," respectively, and to be read and considered as parts hereof.

The resolution of the Shipping Board adopted September 30, 1921, was attached to the agreed statement of facts as an exhibit and is contained in the record at pages 30–32. The important portion thereof is the following (R. 31):

> *Be it further resolved,* That the power and authority vested in the Shipping Board by the Merchant Marine Act, 1920, shall, until otherwise ordered by the Board, be exercised by it through the United States Shipping Board Emergency Fleet Corporation in the following matters, and to the extent and in the manner hereinafter provided:

Then follows an enumeration of activities with certain directions with respect thereto. This portion of the resolution, however, is clearly only in limitation of the portion quoted above, and the sole effect of the resolution was to delegate to the Emergency Fleet Corporation "the power and authority vested in the Shipping Board by the Merchant Marine Act, 1920," with respect to the activities named. Of course the purpose of the Merchant Marine Act and later legislation was to strip the Fleet Corporation of all property and of all activity on its own corporate account and leave it only active as agent of the Shipping Board.

Even if these portions of the record do not show affirmatively that *all* of the Fleet Corporation's activities during the period in question were delegated activities, there can be no doubt that they do show affirmatively that some of its activities

were delegated and that the findings nowhere state that the Fleet Corporation had any activities which were not delegated.

On page 18 of the record, in the agreed statement of facts, it appears that—

> • • • continuously from the time of the organization of the Fleet Corporation until May 23, 1922, the Telegraph Company accepted all messages of the Fleet Corporation and charged for their transmission at the Government rate and gave them priority over commercial messages in transmission without questioning that the Fleet Corporation was entitled to the benefit of that rate with the right of priority in transmission. On or about the date last mentioned, the Telegraph Company caused a communication to be sent to the Fleet Corporation for the first time denying the applicability of the Government rate to all Fleet Corporation messages, and giving notice that the commercial rates would be thereafter applied to such messages.

It further appears that, during the period here in question the telegraphic messages of the Fleet Corporation were sent either on a form headed "Official Telegram—Government Rate—United States Shipping Board Emergency Fleet Corporation," or on the form provided for commercial rate messages but bearing additional words importing that they be sent at the Government rate (R. 17), and that this rate has been paid (R. 7).

Petitioner's contention is that even if the findings fail to show that all of the activities of the Fleet Corporation were in its capacity as agent for the Shipping Board, and if they fail to negative the possibility that some of its activities were on its own corporate account, the findings fail to support the judgment for the respondent, if messages of the Fleet Corporation sent as agent of the Shipping Board take the Government rate. The findings show (R. 17, Finding 16) that all the telegrams purported to be Government messages and in all of them the Fleet Corporation held itself out to be acting as a governmental agency and to be making the contracts for transmission of the messages on behalf of the Government. There was one legal rate for Government messages and another for private messages. The rate for the former was paid. The respondent is in the position of claiming that although the message was contracted for as a Government message, in fact the Fleet Corporation was acting in its own corporate behalf. The burden was on the respondent to show this, not on the Fleet Corporation to negative it.

II. On the oral argument counsel for petitioner referred to a written stipulation (R. 24) entered into by the parties hereto under date of October 19, 1922, providing that this should be a test case, that monthly bills for all messages from and after June, 1922, should be rendered at both the Government and the commercial rate, that they should be paid

at the Government rate, and that with respect to the accumulated monthly differences between the two rates the parties would settle their accounts in accordance with the final determination of this suit.

The importance of the present case is largely due to this stipulation. The amount actually involved in this suit is less than $2,000, but the final decision in this case may determine whether the Fleet Corporation is liable to pay the respondent very large sums and that is why it is hoped that the record may not be found deficient.

III. The defendant's plea was filed on January 23, 1925 (R. 45), four months after the agreed statement of facts, which was filed on September 3, 1924 (R. 5). While it is not contended that the plea can enlarge the agreed statement of facts, it may perhaps be resorted to as at least indicating the interpretation placed by the Fleet Corporation on any ambiguous portions of the statement of facts. The plea clearly set forth that all of the Fleet Corporation's acts during the period in question were performed as agent of the Government. For instance, the plea alleged:

> The defendant avers that it is and at all times herein pertinent has been by law and by executive orders of the President of the United States and by the aforesaid resolution of the Shipping Board, acting solely as the instrumentality of the United States Shipping Board and of the United States and in no other capacity whatever, and that

all the aforesaid telegraphic messages were transmitted and received in pursuit of such authority and exclusively in the course of its employment as such agent and instrumentality, of all of which the plaintiff at all times had full knowledge and notice. (R. 51.)

The defendant avers that all its acts including the telegraphic messages referred to in the declaration and set out in the particulars of demand annexed thereto were done and performed by it solely as the corporate agency and instrumentality of the Government and in the exercise by it of the sovereign powers of the Government, duly delegated to it as aforesaid. (R. 52.)

Respectfully submitted.

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DECEMBER, 1927.

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